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CASE NO. 83–710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF,
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

WHETHER LAW ENFORCEMENT OFFICERS MUST GIVE *"MIRANDA* WARNINGS" TO INDIVIDUALS ARRESTED FOR MISDEMEANOR TRAFFIC OFFENSES. (*MIRANDA v. ARIZONA,* 384 U.S. 436 (1966).)

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BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONER

The State of Ohio, by and through the Attorney General of Ohio, pursuant to Rule 36.4, Rules of the Supreme Court of the United States, respectfully submits this brief as Amicus Curiae in support of the petitioner.

INTEREST OF AMICUS CURIAE

The State of Ohio is primarily entrusted with enforcement of highway safety violations occurring within its borders. As is the case in all states, the most serious problem confronted in highway safety enforcement is

that of the impaired motorist. In 1982, the State of Ohio recorded 48,237 convictions for the offense of driving under the influence. Another 49,687 convictions were entered for the offense of reckless operation and a high percentage of these convictions were plea bargained reductions from charges of impaired driving. Alcohol abuse alone accounted for 42 percent of the 1982 traffic fatalities which occurred in the State of Ohio.[1] The legacy of carnage occasioned by impaired motorists is a national disgrace and continues to escalate despite the concerted efforts of highway safety officers and the concomitant massive expenditure of judicial resources.

The issue before this Court is whether the prophylactic rule enunciated in *Miranda v. Arizona,* 384 U.S. 436 (1966), should be extended so as to encompass the pro forma questions propounded by a highway safety officer to a motorist arrested for impaired driving. In the nearly two (2) decades since the advent of the *Miranda* decision, the State of Ohio has never required the "Miranda warnings" in such a setting. *State v. Pyle,* 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970). This view is not unique to Ohio and has been adopted by other states. *See e.g., State v. Neal,* 476 S.W. 2d 547 (Mo. 1972); *State v. Gabrielson,* 192 N.W. 2d 792 (Iowa 1971), *cert. denied,* 409 U.S. 912 (1972); *State v. Lewin,* 163 N.J. Super. 439, 395 A. 2d 211 (1978), *cert. denied,* 444 U.S. 906 (1979);

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[1] This figure undoubtedly understates the actual percentage of fatalities attributable to impaired motorists. This is due to incomplete reporting by law enforcement agencies and the fact that the figure is limited to alcohol related fatalities and thereby fails to encompass deaths caused by motorists under the influence of other chemical substances, e.g., marijuana, LSD, PCP, narcotics, barbiturates, or other mood altering chemicals.

Capler v. City of Greenville, 207 So. 2d 339 (Miss. 1968), *cert. denied*, 392 U.S. 941 (1968); *State v. Angelo*, 251 La. 250, 203 So. 2d 710 (1976); *State v. Bliss*, 238 A. 2d 848 (Del. 1968). At least one federal circuit court has embraced this analysis. *Clay v. Riddle*, 541 F.2d 456 (4th Cir. 1976).

The opinion of the court below in *McCarty v. Herdman*, 716 F.2d 361 (6th Cir. 1983), effectively overrules the decision of the Supreme Court of Ohio in *State v. Pyle, supra*, and thereby alters long standing practices employed by the State of Ohio in seeking to curb the epidemic of impaired drivers. The State of Ohio thus has a substantial interest in the resolution of the question presented in this case.

SUMMARY OF ARGUMENT

A. The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), was predicated upon the view that recitation of the prophylactic "Miranda warnings" prior to police interrogation of an incommunicado felony suspect was an additional safeguard necessitated by the psychological pressures inherent to such custodial interrogation. The coercive evils perceived in *Miranda* are foreign to the routine and pro forma inquiries made by a highway safety officer to a motorist arrested for impaired driving. To extend the *Miranda* decision to such a commonplace setting is to divorce the decision from its analytical underpinnings and thereby escalate the "Miranda Warnings" from additional safeguards tailored to a perceived abuse into a constitutional imperative arising independent of the rationale which gave rise to their judicially crafted existence. The traditional voluntariness test can adequately ensure Fifth Amendment values in the im-

paired motorist context and should govern the admissibility of statements made by such drivers.

B. The nature of the contact between a highway safety officer and a motorist arrested for impaired driving preempts any reasoned practical application of the *Miranda* decision to such encounter. None of the three (3) views as to when "custody" attaches can rationally accommodate the nature of the contact. The subjective intent of the officer standard was repudiated by the *Miranda* decision itself. The reasonable man test is both unworkable and disingenuous as any reasonable person forced to halt and exit his vehicle and thereupon perform a field sobriety test will perceive himslef to be "in custody" insofar as a layman perceives that concept. The formal arrest standard is a blatant judicial fiction as it elevates form over substance and allows for the admission of the motorist's statements contingent only upon the timing of the highway safety officer's formal articulation of arrest and thus only encourages the officer to delay the rote incantation of a fact known both to himself and the detained motorist.

The implied consent statutes almost uniformly promulgated by the states serve to further frustrate a reasoned application of the *Miranda* decision. Such statutes actually mandate that a highway safety officer take an impaired motorist into custody for the purpose of conveyance to a facility wherein a chemical test can be administered. The "testimonial" or "communicative" distinction drawn by this Court in *Schmerber v. California*, 384 U.S. 757 (1966), is not readily explainable to a lay person. An arrested motorist whose thought processes are chemically impaired will surely experience no small confusion if informed that he need not answer any questions and, in the same breath, is asked whether he

will submit to a chemical test. The operation of an implied consent statute requires both custody and a modicum of verbal intercourse between a highway safety officer and a motorist arrested for impaired driving. The prophylactic rule fashioned in *Miranda* is simply impracticable in such circumstances.

Advocates and detractors alike have conceded that, in the felony interrogation context, the *Miranda* decision provides a "bright-line" rule whereby interrogating detectives may conform their conduct and reviewing courts are more easily able to assess the admissibility of custodial statements. Even this "bright-line" benefit is lost in the setting of an impaired motorist. The *Miranda* decision requires not only the rote recitation of the warnings promulgated therein, but a knowing and intelligent waiver of such warnings. 384 U.S. at 475, *citing, Johnson v. Zerbst,* 304 U.S. 458 (1938). An impaired driver arrested upon probable cause has already demonstrated that he is incapable of performing the relatively simply task of operating a motor vehicle. Depending upon the degree of his chemical impairment, the motorist may not be capable of performing even the most basic physiological functions such as standing without support or talking without a gross slurring of speech. It is a formidable, if not impossible, task to demonstrate that such motorist was sufficiently possessed of cognitive faculties to meet the waiver standard articulated in *Miranda.* Rigid application of *Miranda* thus ends in the anomalous result that probative and reliable statements made by an impaired motorist are kept from the trier of fact due to the very nature of the offense itself. In such circumstances, the *Miranda* decision is transformed from an additional safeguard ensuring Fifth Amendment values into a rule precluding admission of any statement without regard to its voluntary origin.

C. Impaired drivers are, in terms of preventable tragedy, this nation's single most prevalent cause of human suffering. Excluding entirely other types of chemically impaired motorists, drunk drivers alone occasion an almost incomprehensible legacy of carnage. The statistics compiled by the United States Department of Transportation for the calendar year 1982 reflect that alcohol impaired drivers resulted in 28,000 deaths, 670,000 injured persons, 2,600,000 lost work days, 2,500,000 damaged vehicles, and an aggregate financial inpact of 24 billion dollars. Drunk driving has become the leading cause of death nationwide among persons between 15 to 24 years of age. In the past ten (10) years, fully one quarter of a million Americans have died as a consequence of alcohol impaired driving. The Department of Justice figures reflect that during that same ten (10) year period, driving under the influence arrests have actually *increased* by 44.7 percent. In the same decade, arrests of persons under eighteen (18) years of age have increased by 96 percent. Among female drivers in that age bracket the increase has been a staggering 234.4 percent. Nationally in 1982 some 1,778,400 arrests were made for driving while under the influence. This figure accounts for literally two percent of all licensed drivers in the United States. The states and their political subdivision must wrestle with the impaired driver on a daily basis. To date, the states have, despite enhanced public awareness and increased legislative sanctions, been unable to stem the tide of carnage attributable to impaired drivers. In the eighteen (18) years since *Miranda,* this Court has been presented with not so much as a bare allegation of highway safety officers having compelled or otherwise coerced statements from impaired motorists. Absent any such allegation and attendant proof, this Court should not impose the strictures of *Miranda* upon impaired driving arrests and thereby aggravate what is already an all too clear losing effort by the states to remove impaired motorists from this nation's thoroughfares.

ARGUMENT

THE DECISION IN *MIRANDA v. ARIZONA* DOES NOT MANDATE THAT A HIGHWAY SAFETY OFFICER RECITE THE PROPHYLACTIC "MIRANDA WARNINGS" PRIOR TO ROUTINE AND INCIDENTAL QUESTIONING OF A MOTORIST ARRESTED FOR IMPAIRED DRIVING.

A. The Perceived Evils Of Custodial Interrogation Which Predicate The Analytical Underpinnings Of The *Miranda* Decision Are Not Inherent To The Pro Forma Questioning Of A Chemically Impaired Motorist.

The decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), is inapplicable to routine arrests made for highway safety violations. The perceived potential for police abuse which gave rise to the prophylactic warnings promulgated in *Miranda* simply does not exist in the highly structured context of highway safety enforcement. The analytical underpinnings of *Miranda* are predicated upon the view that Fifth Amendment values can only be secured by additional, rigid safeguards when an incommunicado suspect is confronted by experienced interrogators intent upon eliciting a confession to a serious crime. Such circumstances were deemed inherently coercive and thereby necessitated a pre-interrogation notification and waiver of the right to remain silent and consult with counsel. This notification of rights and intentional relinquishment thereof was viewed as imperative in order to assure that statements elicited in such an inherently oppressive atmosphere were in fact the pro-

duct of an accused's volitional consciousness. While acknowledging that the warnings fashioned in *Miranda* placed restrictions upon the acquisition of statements, the Court viewed such limitations as warranted in light of the psychological coercion endemic to skilled interrogation techniques conducted in an oppressive setting and with the sole design toward eliciting incriminating statements.

That *Miranda* must be viewed in the context of the evils which spawned its origin is best demonstrated by reference to the opinion itself. The following is representative language from the *Miranda* opinion:

> . . . the manner in which constitutional rights of the individual could be enforced against overzealous police practices.
>
> 384 U.S. at 444.
>
> * * *
>
> In each [case before the Court], the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. . . .They all thus share salient features - incommunicado interrogation of individuals in a police - dominated atmosphere . . . *An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today.*
>
> 384 U.S. at 445. [emphasis added].
>
> * * *

. . . we concern ourselves primarily with this interrogation atmosphere and the evils it can bring.

384 U.S. at 456.

* * *

In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.

384 U.S. at 457.

* * *

Unless adequate *protective devices* are employed to dispel the compulsion inherent in custodial surroundings, . . .

384 U.S. at 458. [emphasis added].

* * *

The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment.

384 U.S. at 456.

* * *

We have concluded that without proper *safeguards* the process of in-custody

> interrogation of persons suspected or accused of crimes contains inherently compelling pressures . . . *In order to combat the pressures* . . .
>
> 384 U.S. at 467. [emphasis added].

The foregoing excerpts from the *Miranda* opinion could not more clearly demonstrate that the prophylactic warnings judicially crafted therein were to meet an express evil and to combat a perceived potential for police abuse.

The balance struck by the Court in *Miranda* can thus only be analyzed in terms of the dangers which it sought to dissipate. In the routine and daily enforcement of highway safety laws, the ominous poetential for abuse detailed in *Miranda* is wholly absent. As the calculus which occasioned the analysis underlying *Miranda* is inapposite to the nature of the contact between highway safety officers and impaired motorists, extension of the prophylactic rule fashioned therein is analytically indefensible.

The rule enunciated in *Miranda* is not constitutionally compelled but, rather, of prophylactic origin. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). The *Miranda* decision observed that the Fifth Amendment is ". . . as broad as the mischief against which it seeks to guard." 384 U.S. at 459-460. The circumstances faced by an impaired motorist who is detained by a highway patrol officer stand in stark contrast to those of an incommunicado suspect facing the rigors of a skilled detective schooled in the subtle art of interrogation. A highway enforcement officer ordinarily confronts only those motorists who have committed infractions in his

presence. While any motorist undoubtedly feels a degree of anxiety when summoned to halt his vehicle by the universally recognized flashing lights of a highway patrol cruiser,[2] the *de minimus* psychological discomfort occasioned thereby is so commonplace so as to have been experienced by literally millions of American citizens. To equate the routine confrontation between a highway patrolman and an errant driver with the evils chronicled in *Miranda* both ignores the express language of the *Miranda* decision and serves to trivialize its analytical underpinnings. If the decision adopted by the *Miranda* court is to be applied with such rigidity, it is transformed from a safeguard against a perceived abuse into an integral and constitutionally mandated dictate of the Fifth Amendment to the Bill of Rights. This is precisely the result which the *Miranda* majority disavowed. 384 U.S. at 467.

During the entire eighteen (18) years subsequent to this Court's decision in *Miranda*, several states have *not* applied the prophylactic rule of *Miranda* to routine traffic arrests. In almost two decades, this Court has not been presented with any evidence of police abuse or coercion in highway traffic settings. The simple explanation for this lack of abuse lies in the fact that highway safety officers are not possessed of any incentive or motivation to compel a drunk driver to be a witness against himself as that concept is embodied in the Fifth

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[2] In *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court observed:

> . . . these stops [referring to the flashing lights of a police cruiser] generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. [Such stops] interfere with freedom of movement, are inconvenient, and consume time . . . [and] . . . may create substantial anxiety.
>
> 440 U.S. at 657.

Amendment. The primary duty of a highway safety officer is to remove impaired motorists from the state thoroughfares. The officer's function is different in kind from that of a detective as it places a premium on expediency and sheer volume. Driving under the influence of alcohol or other drugs is uniformly a strict liability crime in the various states. An officer engaging an impaired motorist thus need not indulge in superfluous diatribes. Indeed, the very absence of a *mens rea* element preempts much of the concern articulated by the *Miranda* decision. 384 U.S. at 451-452. A highway safety officer's inquiries are thus inevitably pro forma pursuant to the particular "implied consent" statute of the state in issue.

It is beyond dispute that the *Miranda* decision engendered no small amount of debate among both bench and bar. Indeed, the dissent characterized the opinion as ". . . poor constitutional law [which] entails harmful consequences for the country at large." 384 U.S. at 504. Constitutional precepts aside, Justice Harlan ended his dissent by making the following prognostications:

> Today's decision leaves open such questions as *whether the accused was in custody,* whether his statements were spontaneous or *the product of interrogation, whether the accused has effectively waived his rights,* and *whether nontestimonial evidence introduced* at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible

> approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.
>
> 384 U.S. at 545. [emphasis added].

That Justice Harlan's four (4) above stated concerns came to fruition is apparent from this Court's ensuing decisions. [3]

Whether the decision in *Miranda* represents "poor constitutional law" is an issue which falls outside the question presently before this Court. One need not mount a frontal assault upon the prophylactic rule fashioned therein in order to prevail in the instant controversy. The *Miranda* decision is by its own terms analytically inapplicable to the routine and pro forma questioning of an impaired motorist. A contrary resolution can serve only to "constitutionalize" the Miranda warnings and thereby apply them to a context wholly foreign to that which gave rise to their origin. Such result is both logically and analytically indefensible.

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[3] Custody: e.g., *Mathis v. United States*, 391 U.S. 1 (1968); *Orozco v. Texas*, 394 U.S. 324 (1969); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *California v. Beheler*, _____U.S._____, 77 L. Ed. 2d 1275 (1983); Interrogation: *Rhode Island v. Innis*, 446 U.S. 291 (1980); Waiver: *North Carolina v. Butler*, 441 U.S. 369 (1979); Derivative Evidence: *Michigan v. Tucker*, 417 U.S. 433 (1974).

B. The Very Nature Of The Contact Between A Highway Safety Officer And An Impaired Motorist Precludes, As A Matter Of Pragmatism, Any Reasoned Application Of The Prophylactic Rule Of The Miranda Decision To Such Setting.

The contact between a highway safety officer and an arrested impaired motorist is different in kind from that of a detective and an incommunicado felony suspect. Be it benevolent or malevolent, the *Miranda* decision has provided at least a workable framework from which both interrogation specialists and the lower courts can work in the furtherance of felony interrogation. The issue presently before this Court is whether the prophylactic "Miranda warnings" should be extended beyond the perceived need articulated in the *Miranda* decision. To this end, it is essential to evaluate not only the motive or incentive for mischief by highway safety officers but, more importantly, the mandatory constraints under which they operate.

Several states, including Ohio, have recognized the fundamental distinction between the nature of the questioning of an impaired motorist by a highway safety officer and the "custodial interrogation" contemplated by the *Miranda* decision. *See e.g., State v. Pyle,* 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970); *State v. Neal,* 476 S.W. 2d 547 (Mo. 1972); *State v. Gabrielson,* 192 N.W. 2d 792 (Iowa 1971), *cert. denied,* 409 U.S. 912 (1972); *State v. Lewin,* 163 N.J. Super. 439, 395 A. 2d 211 (1978), *cert. denied,* 444 U.S. 906 (1979); *Capler v. City of Greenville,* 207 So. 2d 339 (Miss. 1968), *cert. denied,* 392 U.S. 941 (1968); *State v. Angelo,* 251 La. 250, 203 So. 2d 710 (1976); *State v. Bliss,* 238 A. 2d 848 (Del. 1968). At least one federal circuit court has recognized the distinction. *Clay v. Riddle,* 541 F.2d 456 (4th Cir. 1976).

Other courts have simply assumed without analysis that the *Miranda* decision encompasses every custodial encounter with a law enforcement officer. Such a misconception has ordinarily found its origin in a literal and liberal interpretation of the following language in *Miranda:*

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.*
>
> 384 U.S. at 444. [emphasis added] [footnote omitted].

It is the above emphasized language which gives rise to the "custody analysis". Such analysis focuses not upon whether the *Miranda* decision is or should be applicable to the questioning of a motorist detained for impaired driving, but rather, the point at which the motorist is ". . . deprived of his freedom of action in any significant way". This analysis is not only grounded upon an erroneous precept, i.e., that *Miranda* should be rotely applied to every encounter with a law enforcement officer, but leads to wholly anomalous results.

The lower courts are in marked disagreement as to the precise point at which an impaired motorist experiences ". . . 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[4]

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[4] A comprehensive analysis of the differing views adopted by the various jurisdictions is contained in the petition for writ of certiorari presently pending before this Court in *Oregon v. Roberti,* No. 82-315 (petition filed August 20, 1982, 52 U.S.L.W. 3095).

California v. Beheler, _____U.S._____, 71 L. Ed. 2d 1275, 1279 (1983), *citing Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). However, the divergent views may be analyzed in terms of three (3) generalized categories. The subjective intent test views custody as attaching at the point at which the officer forms the unarticulated intent to effectuate an arrest. This analysis has been expressly rejected by this Court.[5] *California v. Beheler*, _____U.S. _____, 71 L. Ed. 2d at 1279 n.2. The reasonable man test of custody is equally unavailing as any motorist forced to halt, exit his vehicle and thereupon perform a field sobriety test will "reasonably" perceive himself as being "in custody" as a layman understands that term. The formal arrest standard is a judicial fiction as it predicates the admissibility of statements solely upon the timing of the highway safety officer's formal articulation of an impaired motorist's custodial status. In his dissent in *Oregon v. Mathiason*, 429 U.S. at 449 n.5, Justice Marshall cogently observed the potential for mischief that the adoption of the formal arrest test would create by stating:

> I trust today's decision does not suggest that police officers can circumvent Miranda by deliberately postponing the official "arrest" and the giving of Miranda warnings until the necessary statements have been obtained.

In the context of a highway safety arrest none of the three (3) custody tests provides a workable framework to assess custody as this Court has intended the term.

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[5]While rejected by this Court, the subjective intent test is embraced by at least one jurisdiction. *See State v. Roberti*, 293 Or. 59, 644 P. 2d 1104, *on rehearing*, 293 Or. 236, 646 P. 2d 1341 (1982).

Reasoned application of *Miranda* to highway safety arrests is further frustrated by the almost uniform adoption of implied consent laws by the states.[6] This Court has approved implied consent laws in a variety of contexts. *See e.g., Schmerber v. California,* 384 U.S. 757 (1966); *Mackey v. Montrym,* 443 U.S. 1 (1979); *South Dakota v. Neville,* _____U.S._____, 74 L. Ed. 2d 748 (1983). Such statutes require that upon probable cause a motorist be taken into custody for at least conveyance to a facility wherein a chemical test can be performed. The highway safety officer must of necessity engage in a modicum of dialogue with the impaired driver and make inquiry as to whether he will consent to the test. In such setting, application of *Miranda* is impracticable and could well result in an impaired motorist refusing the chemical test solely as a consequence of confusion caused by the irreconcilable statements made by the highway patrolman.

A final impracticability of *Miranda* in the impaired motorist context is that it loses its bright-line effect. In the felony interrogation setting, the prophylactic precepts articulated in *Miranda* serve to both regulate police conduct and provide lower courts with a ready rule with which to assess the admissibility of statements elicited. The *Miranda* decision is, however, two-fold and requires not only recitation of the warnings, but a knowing and intelligent waiver of such warnings. 384 U.S. at 475, *citing Johnson v. Zerbst,* 304 U.S. 458 (1938). Application of *Miranda* to impaired drivers thus actually inter-

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[6] As of 1982, forty-five (45) states and the District of Columbia have adopted implied consent laws. National Highway Safety Administration; U.S. Department of Transportation, *A Digest of State Alcohol-Highway Safety Related Legislation* (Second Edition) (DOT HS 806 480 August 1983) p. 2-1, 2-2.

jects a needless element of uncertainty with respect to any statements made. It is difficult indeed to demonstrate that a motorist who has shown himself to be incapable of driving an automobile in a straight line is at the same time possessed of the cognitive wherewithal to form an intelligent decision with respect to the waiver of Miranda warnings. This dichotomy leads to the anomalous result that the greater the degree of impairment, the more susceptible any statements are to a pretrial suppression motion.[7] This bizarre result alone counsels against extension of *Miranda* to the impaired motorist context.

C. The National Epidemic Of Impaired Drivers Mitigates Against Extension Of The Miranda Decision Absent Evidence Of Abuse During The Routine And Brief Questioning Of Such Motorists.

In *South Dakota v. Neville*, _____U.S._____, 74 L. E. 2d at 755, this Court alluded to the nationwide dilemma of impaired drivers as follows:

> The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recita-

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[7] This seemingly ludicrous result is not without concrete foundation. The victory obtained by the State in *South Dakota v. Neville*, _____U.S. _____, 74 L. Ed. 2d 748 (1983) may well have been pyrrhic. As this Court observed, Neville's case was remanded "for a determination whether [his] statement that he was too drunk to pass the test was made after a voluntary waiver of his right to remain silent." _____U.S._____, 74 L. Ed. 2d at 755 n.6. Neville had consumed "close to one case" of beer.

> tion here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. *See Breithaupt v. Abram,* 352 US 432, 439, 1 L Ed 2d 448, 77 S Ct 408 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short,* 401 US 395, 491, 28 L Ed 2d 130, 91 S Ct 668 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell,* 402 US 637, 657 and 672, 29 L Ed 2d 233, 91 S Ct 1704 (1971) (Blackmun, J., consurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym,* 443 US 1, 17-18, 61 L Ed 2d 321, 99 S Ct 2612 (1979) (recognizing the "compelling interest in highway safety").

While forcefully stated, the foregoing actually fails to sufficiently emphasize the scope of this Nation's struggle against drunk and otherwise chemically impaired drivers.

Statistics compiled by the National Highway Safety Administration indicate that in 1982 alcohol impaired drivers alone accounted for 28,000 fatalities, 670,000 injuries, 2,600,000 lost working days, 2,500,000 damaged vehicles, and an aggregate cost of 24 billion dollars. The leading cause of death for Americans from 15 to 24 years of age is drunk driving and an average of 14 teenagers are killed and another 360 are injured every day on our

Nation's highways. National Highway Traffic Safety Administration; U.S. Department of Transportation, *A Digest of State Alcohol-Highway Safety Related Legislation* (Second Edition) (DOT HS 806 480 August 1983) p. iii. Excluding entirely other impaired motorists, drunk drivers cause 47 percent of all traffic fatalities, 11 percent of all personal injury crashes, and 5 percent of all property damage accidents. National Highway Traffic Safety Administration; U.S. Department of Transportation, *Alcohol Involvement in Traffic Accidents* (DOT HS 806 269 May 1982) p. 1. In 1982, an estimated 1,788,400 arrests were made for driving while under the influence. This represents a 44.7 percent *increase* in the period from 1973-1982. During that same period, arrests of persons under eighteen (18) years of age escalated 96 percent. Gender serves as no immunity to the epidemic; during the ten (10) year period arrests of impaired females rose by 121.6 percent and arrests of females under eighteen (18) went up a staggering 234.4 percent. Federal Bureau of Investigation; U.S. Department of Justice, *Crime in the United States: Uniform Crime Reports, 1982,* Washington D.C.: U.S. Government Printing Office, September 11, 1983. p. 167-174. Each year, two percent of all licensed motorists are arrested for driving while under the influence. Of such arrests, 66 percent result in conviction. Of those arrested, 20 percent refuse to take a chemical test. National Highway Traffic Safety Administration; U.S. Department of Transportation, *A National and State Alcohol Assessment 1978 Through 1981* (DOT HS 896 313 December 1982) p. 10.

While several states have supposed mandatory incarceration for first offender impaired motorists, only nine (9) states typically impose a jail sanction on first offenders. In 1982 alone, twenty-two (22) states and the District of Columbia enacted new driving under the

influence legislation. National Highway Traffic Safety Administration; U.S. Department of Transporation, *DWI Sanctions: The Law and Practice* (DOT HS 806 417 June 1983) p. III-2 and Appendix C 1-7. There are an estimated 21,000 judges nationwide who adjudicate highway safety cases and a substantial portion of their caseloads is spent in impaired driving litigation. Each jurist presides over an average of eighty-five (85) driving under the influence casses annually. *Presidential Commission on Drunk Driving; Final Report* (November 1983) p. 17. Prominent among the recommendations of the Presidential Commission was that "laws, policies and procedures should be adopted to expedite arrest, booking, and charging procedures. . .in order to return officers to patrol duties as soon as possible and to increase significantly the efficiency of the entire arrest process." *Id.* at 15-16.

The extension of *Miranda* to the impaired motorist context will serve to needlessly expend time during the arrest and processing procedures and provide for a built-in pre-trial suppression motion regarding the knowing and intelligent waiver of the "Miranda warnings." While the core values of the Fifth Amendment must never be sacrificed for the sake of expediency, the prophylactic warnings promulgated in *Miranda* are not of constitutional origin. There exists no documentation reflecting abuse by highway safety officers so as to warrant the need for additional safeguards to ensure that statements made by impaired drivers are not compelled as that term is embodied in the Fifth Amendment. The legacy of carnage occasioned by impaired motorists is a national disgrace and the states have thus far been unable to stem its tide. Absent demonstrable evidence of abuse, this Court should not interject the strictures of *Miranda* into a battle which is already being lost to the common detriment of all American citizens.

CONCLUSION

For the reasons stated above, the circuit court erroneously applied the decision in *Miranda v. Arizona* to the voluntary statements admitted into evidence. As such, the decision of the circuit court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Brief of Amicus Curiae State of Ohio have been served on petitioner, Harry J. Berkemer, by forwarding such copies through the office of petitioner's counsel of record, Alan C. Travis, Assistant Prosecuting Attorney, Hall of Justice, 369 South High Street, Columbus, Ohio 43215, and respondent Richard N. McCarty, by forwarding such copies through the office of respondent's counsel of record, R. William Meeks, 503 South High Street, Columbus, Ohio 43215, by United States Mail, postpaid, this _____ day of February, 1984.

RICHARD DAVID DRAKE
Assistant Attorney General